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No. 91-5397

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

EMERY L. NEGONSOTT

Petitioner,

v.

HAROLD SAMUELS and the ATTORNEY GENERAL
OF THE STATE OF KANSAS

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

- I. THE RESPONDENTS CONCUR WITH THE QUESTION PRESENTED AS STATED IN PETITIONER'S PETITION FOR CERTIORARI.

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CONSTITUTIONAL PROVISIONS, TREATIES AND
STATUTES INVOLVED

The Petitioner has provided in his brief the provisions of 18 U.S.C. § 3243 and 18 U.S.C. § 1153. In addition to these statutory provisions Respondents believe that referral to the following statutory provisions would be of benefit to the Court in determining whether Certiorari would be proper since these provisions are specific criminal jurisdictional grants by Congress to states that followed the enactment of 18 U.S.C. § 3243.

62 Stat. 1161, ch. 759: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the State of Iowa over offenses committed by or against Indians on the Sac and Fox Indian Reservation in that State to the same extent as its courts have jurisdiction

generally over offenses committed within said State outside of any Indian reservation: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on Indian reservations."

60 Stat. 229, ch. 279: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred on the State of North Dakota over offenses committed by or against Indians on the Devils Lake Indian Reservation in North Dakota to the same extent as its courts have jurisdiction generally over offenses committed within said State outside of Indian reservations: Provided, however, That nothing herein contained shall deprive the courts of the United States of jurisdiction over offenses defined by the laws of the United States committed by or against Indians on said reservation, nor shall anything herein contained deprive any Indian of any protection afforded by Federal laws, contract, or treaty against the taxation or alienation of any restricted property."

62 Stat. 1224, ch. 809, codified at 25 U.S.C. § 232, "The State of New York shall have jurisdiction over offenses committed by or against Indians on Indian reservations within the State of New York to the same extent as the courts of the State as defined by the laws of the State: Provided, That nothing contained in this section shall be construed to deprive any Indian tribe, band, or community, or members thereof, hunting and fishing rights as guaranteed them by agreement, treaty, or custom, nor require them to obtain State fish and game licenses for the exercise of such rights."

63 Stat. 705, ch. 604: "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That on and after January 1, 1950,

all lands located on the Agua Caliente Indian Reservation in the State of California, and the Indian residents thereof, shall be subject to the laws, civil and criminal, of the State of California, but nothing contained in this section shall be construed to authorize the alienation, encumbrance, or taxation of the lands of the reservation, or rights of inheritance, thereof whether tribally or individually owned, so long as the title to such lands is held in trust by the United States, unless such alienation, encumbrance, or taxation is specifically authorized by the Congress.

Sec. 2. Notwithstanding any other provision of law or the allotment in severalty to Indians of the Aqua Caliente Indian Reservation, and subject to the provisions of section 3 of this Act, no valid and existing permit covering lands located on the reservation, the terms of which have been fully met by the permittee, shall be terminated without the consent of the permittee prior to December 31, 1950.

Sec. 3. The city of Palm Springs in Riverside County, California with the approval of the Secretary of the Interior, and subsequent to an appropriate resolution adopted by the business committee of the Aqua Caliente Band of Mission Indians, giving approval, is hereby granted an easement not to exceed sixty feet in width for public use, and the widening and improvement of Indian Avenue along and upon section 14, township 4 south, range 4 east, San Bernardino base and meridian, in said city, said easement generally following and adjoining the east section line but within the confines of its middle portion, for the isolation and preservation of the Indian Hot Springs and the palm trees in said area, the center line of said easement shall follow an arc having a radius of one thousand two hundred seventy feet, the center and most easterly portion of the arc being one hundred forty feet east of the quarter section corner of said section 14. Said city also is granted an easement for similar purposes along and upon the westerly ten

feet of said section 14, lying within the arc. Said improvements shall be made at the expense of said city: Provided, That any holder of a valid permit covering land affected by the said widening of Indian Avenue shall be entitled to just compensation from said city of Palm Springs for the detriment suffered, taking into consideration benefits deriving from such improvement."

STATEMENT OF THE CASE

This petition results from the conviction for the crime of aggravated assault contrary to K.S.A. 21-3410, entered by the state District Court of Brown County, Kansas. The Petitioner and his victim are enrolled members of the Kickapoo Tribe in Kansas and the offense occurred on the Kickapoo Reservation located in Brown County, Kansas. While the crime for which the Petitioner was convicted is enumerated in the Major Crimes Act, 18 U.S.C. § 1153, jurisdiction for prosecution by the State of Kansas is provided by 18 U.S.C. § 3243.

Subsequent to the decision by the Tenth Circuit Court of Appeals decision affirming the denial of Habeas Corpus relief but prior to his Petition for Certiorari, Petitioner's sentence was fully discharged. Therefore Petitioner's statement at page 5 of his Petition for Writ of Certiorari that he is currently on parole is no longer correct.

PROCEDURAL HISTORY OF THE CASE

Petitioner was found guilty of aggravated assault following a jury trial in the District Court of Brown County, Kansas. The District Court set aside the conviction relying on the decision of the Kansas Supreme Court in *State of Kansas v. Mitchell*, 231 Kan. 142, 642 P.2d 981 (1982). The State of Kansas appealed the state trial court's decision to the Kansas Supreme Court which reversed the trial court in *State of Kansas v. Negonsott*, 239 Kan. 127, 716 P.2d 585 (1986). Petitioner's case was remanded by the state Su-

preme Court to the District Court of Brown County, Kansas for sentencing. The state District Court imposed a sentence of not less than three nor more than ten years.

The Petitioner brought suit in the United States District Court for the District of Kansas seeking Habeas Corpus relief pursuant to 42 U.S.C. § 2254. *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, case No. 88-3049-S (D.Kan. September 22, 1988). Habeas Corpus relief was denied by the United States District Court on September 22, 1988. (Id.). The Tenth Circuit Court of Appeals affirmed the United States District Courts' denial of Habeas relief. *Negonsott v. Harold Samuels and the Attorney General of the State of Kansas*, case No. 88-2666 (10th Cir.).

The Kansas Supreme Court in *State v. Negonsott*, supra, the United States District Court for the District of Kansas and the Tenth Circuit Court of Appeals all held that the State of Kansas has been given jurisdiction to prosecute the Petitioner pursuant to 18 U.S.C. § 3243.

REASONS FOR GRANTING THE PETITION

Respondents concur with the position of the Petitioner that issuance of a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Tenth Circuit would be beneficial for the lower Courts of the Federal and State judiciary in this matter of state application of the jurisdiction provided by 18 U.S.C. § 3243 and the statutes that were modeled upon it. However, due to the Respondents' obligation to the Court, it must be pointed out that the petitioner has been discharged from the sentence imposed as a result of the conviction that gives rise to his Petition for Certiorari review of his appeal denying federal Habeas Corpus relief pursuant to 42 U.S.C. § 2254.

The issue of whether a state has the jurisdiction to prosecute American Indians that commit crimes on Reservations located within the boundaries of a state pursuant

to Congressional grants of authority despite the crime also being enumerated in the Major Crimes Act found at 18 U.S.C. § 1153 is of great import to the Tribes, the States in which those Reservations are located and the Federal Government. The statute that gives rise to the State of Kansas' jurisdiction over offense committed on Reservations located within its boundaries, 18 U.S.C. § 3243, was the model for Congressional grants of criminal jurisdiction to the State of Iowa, 62 Stat. 1161, ch. 759; North Dakota, 60 Stat. 229, ch. 279; New York, 62 Stat. 1224, ch. 809, codified at 25 U.S.C. § 232; and California, 63 Stat. 705, ch. 604. Litigation of the Congressional grant of criminal jurisdiction to the State of Iowa has resulted in a decision by the Eighth Circuit Court of Appeals in *Youngbear v. Brewer*, 549 F.2d 74 (8th Cir., 1977) which is contrary to the holding of the Tenth Circuit in the present case.

A decision by this Court would determine the effect of the specific Congressional grants of criminal jurisdiction for these other states as well as Kansas and resolve the conflict that currently exists between the Tenth Circuit and the Eighth Circuit Courts of Appeal. In the case of the State of Iowa, a decision by this Court would probably be the only avenue available for Iowa to resume criminal prosecutions of crimes committed on Reservations within that state since it is bound by the decision in *Youngbear*, supra. It is a reality that decisions involving criminal jurisdiction that are contrary to the state can rarely be overruled since the factual basis for a subsequent determination are created by the state only when it acts contrary to existing case law.

A decision by this Court would provide guidance to the law enforcement agencies of the States that have been given Congressional grants of criminal jurisdiction, assist the federal law enforcement agencies in coordinating their resources with the States, and inform the members of the

Tribe which jurisdiction they may rely on for police protection.

While the Respondents agree with the Petitioner that the issue of whether the State of Kansas may prosecute crimes committed on Reservations pursuant to U.S.C. § 3243 when the crime is also enumerated in 18 U.S.C. § 1153 is worthy of Certiorari review by this Court, Respondents must point out that the Petitioner in the present case is no longer in custody within the meaning of 28 U.S.C. § 2254. The discharge of the Petitioner's state sentence of course negates the impact of any decision of this Court to the Petitioner. The Respondents are aware of this Court's decisions in *Carafas v. LaVallee*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968) and *Maleng v. Cook*, 490 U.S. 1032, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). In *Carafas* and *Maleng* this Court held that Habeas Corpus relief was available if the Petitioner was in custody at the time that his petition was filed with the Federal Court. In the present case the Respondents concede that Petitioner was in the custody of the State of Kansas at the time he petitioned the United States District Court for Habeas relief and brought his appeal before the Tenth Circuit Court of Appeals.

The Respondents' position that Certiorari would be proper in this case should not be viewed by the Court that Respondents do not believe that the Tenth Circuit's decision was in error. The decision of the Tenth Circuit properly set out the interplay between the jurisdictional grant of 18 U.S.C. § 3243 and the Major Crimes Act found at 18 U.S.C. § 1153 and the legislative history of 18 U.S.C. § 3243.

IN CONCLUSION, Respondents believe that issuance of the Writ of Certiorari would be of benefit in the resolution of the contrary opinions of the Eighth and Tenth

Circuit Courts of Appeals regarding the authority of a state to prosecute criminal offenses pursuant to a specific grant by Congress.

Respectfully submitted,

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